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In the Supreme Court of the United States

FLORENCE E. MANNEL
Petitioner,

v

INDUSTRIAL COMMISSION OF ARIZONA
Respondent,

DEPARTMENT OF TRANSPORTATION
Respondent Employer,

STATE COMPENSATION FUND
Respondent Carrier,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION ONE

BERNARD I. RABINOVITZ, ESQ.
P.O. Box 41658
Tucson, Arizona 85717
(602) 624-5526

QUESTION PRESENTED

Whether Arizona Revised Statute Title 23, Section 1023, herein cited as A.R.S. Section 23-1023, as interpreted by the Court of Appeals of the State of Arizona, Division One, in *Mannel v. Industrial Commission of Arizona, et al.,* is a taking by the State of Arizona of Petitioner's private property for public use without just compensation.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION ONE

FLORENCE E. MANNEL, by and through her attorney, Bernard I. Rabinovitz, petitions herein for a Writ of Certiorari to review the Decision of the Court of Appeals of the State of Arizona, Division One, which affirmed the Decision, Findings, and Award of the Industrial Commission of Arizona and amounted to a taking of Petitioner's property without just compensation.

OPINION BELOW

The Opinion of the Court of Appeals of the State of Arizona, Division One, filed May 17, 1984, affirming the Decision, Findings, and Award of the Industrial Commission of Arizona is reprinted in full as Appendix A.

JURISDICTION

The Opinion and Order appealed from was filed May 17, 1984. The Order of the Supreme Court of Arizona denying Petition for Review was made on September 13, 1984. The Order of the Supreme Court of Arizona denying Petitioner's Motion for Permission to File Motion to Reconsider was filed October 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

Section 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARIZONA STATUTORY PROVISION INVOLVED

A.R.S. Section 23-1023, provides:

"A. If an employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.

B. If the employee entitled to compensation under this chapter, or his dependents, does not pursue his or their remedy against such other person by instituting an action within one year after the cause of action accrues, the claim against such other person shall be deemed assigned to the insurance carrier, or to the person liable for the payment thereof. Such a claim so assigned may be prosecuted or compromised by the insurance carrier or the person liable for the payment thereof, or may be reassigned in its entirety to the employee or his dependents. After the reassignment, the employee entitled to compensation, or his dependents, shall have the same rights to pursue the claim as if it had been filed within the first year.

C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery. The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. Compromise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the compensation fund, or of the person liable to pay the claim."

STATEMENT OF THE CASE

On September 21, 1978, Howard Mannel, decedent herein, sustained an industrial injury. The employer was insured under the provision of the Arizona Workmen's Compensation Act against liability for the payment of medical, surgical, hospital and/or compensation benefits. The decedent's claim was accepted and benefits paid by the Arizona State Compensation Fund until approximately July, 1981, at which time the decedent and FLORENCE MANNEL, herein the Petitioner, entered into an agreement to compromise and settle a third party claim, which arose out of the subject industrial episode for the sum of $160,000.00. The insurance carrier approved the settlement and received the sum of $24,655.57 in complete payment of its claimed lien to that point and asserted a credit against the payment of any further compensation, medical, surgical and hospital benefits.

On April 16, 1982, the decedent died suddenly in a barber's chair. At the time of his death there was a credit against further compensation still being asserted by the Respondent, in the sum of approximately $79,000.00. On May 14, 1982, the Petitioner filed a claim for widow's death benefits. On June 4, 1982, the Respondent Insurance Carrier denied the Petitioner's claim. Formal hearings were held in Tucson, Arizona, on January 3, 28 and February 7, 1983, before the Industrial Commission of Arizona. The preponderance of the evidence established that the demise of the decedent was within a reasonable degree of medical probability, caused by the industrial episode and resultant injury. The Administrative Law Judge awarded burial expenses and widow's death benefits as set out in the death benefits statute; however, said Award was subjected to a *new* credit or lien of $79,000.00. In essence the unused portion of the decedent's lien would prevent the widow from receiving any benefits for some fifteen years.

Petitioner filed a special action Petition to Review the Award before the State of Arizona, Court of Appeals, Division One. Wherein the issue was whether present death benefits that had not matured when the employee's third party action against the tort-feasor was settled are subject to the unsatisfied portion of the credit. The Court held that the widow's benefits are subject to said credit and therefore affirmed the award.

By the interpretation of the Court of Appeals of the State of Arizona, Division One, of the Arizona Revised Statute Section 23-1023 in *Mannel v. Industrial Commission of Arizona, et al.*, the State of Arizona has taken Petitioner's property without just compensation.

The Supreme Court of the State of Arizona refused to take review of said decision as indicated above.

REASONS FOR GRANTING THE WRIT

The Decision below creates a lien in a statute where none exists. As a practical matter, Petitioner will have to wait some fifteen years before starting to receive benefits to which she was found entitled in 1984. This Decision allows the State of Arizona through its Industrial Commission, to take private property, an independent statutory right to widow's death benefits, for public use without compensation. To adequately assess this charge against the State, the statutory scheme must first be examined.

A.R.S. Section 23-1021 defines the right of the employee to compensation. Distinct from that right is the widow's and dependent's right to death benefits set forth in A.R.S. Section 23-1046. (See Appendix E.) By its own edict, below, the Arizona Court of Appeals stated that,

> "...[death benefits]...are an independent statutory right that do not derive from the decedent. A worker's compromise of his rights to worker's compensation medical expenses and disability benefits does not affect the rights of

his dependent's death benefits. See, e.g. *Kay v. Hillside Mines, Inc.*, 54 Ariz. 36, 91 P. 2d 867 (1939); *accord* 2A Larson, [Workmen's Compensation Law], Section 64." *Mannel v. Industrial Commission of Arizona, et. al.*, slip op., page 8 (see Appendix).

Given the existence of two statutory rights, a detailed analysis and comparison of the language of the individual subsections of A.R.S. Section 23-1023 illustrates that no lien was intended to attach to the widow's workers compensation death benefits because of the third party claim recovery based on the employee's injuries.

Subsection (A) of A.R.S. Section 23-1023 allows the employee to pursue *his* (the employee's) remedy against the wrong of a third party or alternatively, in the event of the employee's death, *his* (the employee's) dependents may pursue *his* remedy against the third party. The employee pursuing his own remedy would be a personal cause of action, while the dependents pursuing the employee's remedy would be on a survival theory and not a theory of wrongful death. (Emphasis supplied.)

Subsection (B) of A.R.S. Section 23-1023 sets out the time limitations for filing third party claims without obtaining a reassignment of the claims from the carrier or person liable. The language *"his or their remedy"* in this subsection when compared with Subsection (A) can only mean that the employee may bring *"his"* personal action; his dependents, should he die, may bring *"his"* (the employee's) survival action, and the dependents may also bring *"their"* wrongful death actions. (Emphasis and parentheticals supplied.)

Finally, Subsection (C) of A.R.S. Section 23-1023, which creates the lien, uses both the language *"he"* and "the employee or *his* dependents." For this subsection to make logical sense and agree with Subsections (A) and (B), the following meanings must attach. With respect to the "compromise of any claims" clause of Subsection (C), "the employee or his dependents" can refer to

compromise of any third party claim, be it a personal, survival, or wrongful death cause of action.

The critical clause of A.R.S. Section 23-1023 which sets out the lien against third party recovery uses the word "he". Clearly, "he" can only be the employee, and therefore, the lien can only attach to the employee's rights.

Throughout all of A.R.S. Section 23-1023 the use of male gender pronouns indicates specifically the employee. Similarly, the use of the plural pronoun "their" indicates someone other than the employee; specifically, dependents. We agree with the Court, below, wholeheartedly when it said that these subsections concern the same subject and they therefore should be interpreted as a whole. *Talley v. Industrial Commission of Arizona,* ICA-IC 2809), _____ , Ariz. _____ , _____ P. 2d _____ (Ariz. App., August 16, 1983).

This is the only lien provision in the Arizona statutory scheme. There is no corresponding lien which applies to the independent statutory right of dependents' benefits. The Arizona courts have held time and again with respect to the Worker's Compensation Act that if something is not in the statute, like a lien on dependent's benefits, then it is simply not there!

The right conferred upon injured workmen by [the Act] being purely statutory, cannot be extended beyond the terms of the statute creating it. A.R.S. Section 23-101 et seq. *Sorenson v. Six Companies,* 53 Ariz. 83, P. 2d 980 (1939).

[The Act] is purely statutory in its origin, and benefits thereunder can be granted only when provided by statute. A.R.S. Section 23-101 et. seq. *Kay v. Hillside Mines,* 91 P. 2d 867, 54 Ariz. 36 (1939). The rights acquired under [the Act] are purely statutory and one claiming compensation must bring himself within the terms of the act. A.R.S. Section 23-101 et seq. *Danner v. Industrial Commission,* 95 P. 2d 53, 54 Ariz. 275 (1939). The right to compensation is purely statutory in nature, and resort

must be made to the statute to determine its extent and limitations. A.R.S. Section 23-101 et seq. *Paramount Pictures v. Industrial Commission,* 106 P. 2d 1024, 56 Ariz. 217, 352 (1940). Rights under workmen's compensation laws are completely statutory and arguments concerning the inadequacy of worker's compensation benefits as opposed to being allowed to recover damages in the Superior Court from his self-insured employer and its agent were *best addressed to the legislature. —Sandoval v. Salt River Project Agricultural Improvement and Power Dist.,* 571 P. 2d 706, 117 Ariz. 209 (App. 1977). (Emphasis supplied.)

Clearly the Legislature was choosing its words very, very carefully to express its true intent. This intent to not include death benefits within the lien clause is also exhibited in the State Constitution, the spirit and intent of the Arizona Workmen's Compensation Statutes, and authorities from other jurisdictions.

By applying the decedent's lien to the Petitioner's claim, the State of Arizona has essentially eliminated the widow's constitutionally guaranteed right to compensation benefits. *Article 18 Section 8 of the Arizona Constitution* provides for benefits should death be caused to a worker by injury arising out of and in the course of his employment and commands that this right be left intact:

> "... and provided further in order to assure and make certain a just and humane compensation law in the State of Arizona, for the relief and protection of such workmen, their widows, children or dependents, as defined by law, from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the State of Arizona, and producing uncertain and unequal compensation therefor, ..."
>
> "The percentages and amounts of compensation provided in House Bill No. 227 enacted by the Seventh Legislature of the State of Arizona, shall never be reduced nor any industry included within the provision of said House Bill No. 227

eliminated except by initiated or referred measure as provided by this Constitution."

Article 18, Section 8 of the Arizona Constitution.

It is the position of the Petitioner herein that by imposing the lien pertaining to her husband's personal injury settlement upon her claim for widow's death benefits, she is effectively being denied the compensation benefits guaranteed to her by this constitutional provision. This, of course, would be a state issue and this point is made only to illustrate the intent of A.R.S. Section 23-1023.

The spirit and intent of the Arizona Workmen's Compensation Act, A.R.S. Section 23-901, et seq. of which A.R.S. Section 23-1023 is a part, has always been held by the Arizona Courts to require a liberal construction in favor of the worker and/or his dependents as follows: [The Act] should be given a liberal construction with a view to effectuating the principle of placing the burden of death and injury on industry. *Pottinger V. Industrial Commission,* 22 Ariz. App. 389, 527 P. 2d 1232 (1974); *Peter Keweit & Sons's Co. v Industrial Commission,* 88 Ariz. 164, 354 P. 2d 28 (1960); *Hannon v. Industrial Commission,* 9 Ariz. App. 231, 451 P. 2d 44 (1969). The public policy under [the Act] has been *first* to protect the employee... and *second* to protect the Compensation Fund... *State ex. rel. Industrial Commission v. Pressley,* 74 Ariz. 412, 250 P. 2d 992 (1952) (Emphasis supplied). [The Act] serves the economic and social welfare purposes of preventing claimants and their dependents from becoming public charges during the period of disability. *Jalifi v. Industrial Commission of Arizona,* 132 Ariz 233, 644 P. 2d 1319, (App. 1982), Appeal dismissed 103 S. Ct. 200. Finally, [the Act] affords the exclusive remedy for dependents against decedent's employer and insurance carrier. *Rios v. Industrial Commission,* 120 Ariz. 374, 586 P. 2d 219 (App. 1978). Petitioner agrees with the Court below when it said that the terms of Section 23-1023 are determinative as opposed to out-of-state authority. *Mannel v. Industrial Commission of Arizona,* see Appendix. However, when the State and its Courts are unable to derive the true meaning and

intent of the statute then these secondary authorities may be useful to this Honorable Court in determining whether there is a right, which was intended by the legislature, being taken away for public use without just compensation.

Transcontinental Insurance Co. v. Walsh, 621 S.W.2d. 461, Tex. App. 1981, is factually in point with the instant case, and although the Texas statute is worded differently, the overall effect is the same as A.R.S. Section 23-1023 C.

In this decision the settlement of the husband's third party lawsuit even included $100,000 specifically for damages sustained by the widow. The carrier in that case was claiming an entitlement to offset the net recovery in the third party action against the widow's claim for death benefits. The statute in question in Texas involves Section 6(A) of Article 8307, Vernon's Tex. Civ. St.:

> "If at the conclusion of a third party action a workman's compensation beneficiary is entitled to compensation, the net amount recovered by such beneficiary from the third party action shall be applied to reimburse the association for past benefits and medical expenses paid and any amount in excess of past benefits and medical benefits shall be treated as an advance against future benefit payments of compensation to which the beneficiary is entitled to receive under the Act. When the advance is adequate to cover all future compensation and medical benefit payments as provided by this law, no further payment shall be made by the association but if insufficient, the association shall resume such payments when the advance is exhausted...."

In finding an entitlement to death benefits the Texas Court of Civil Appeals held as follows:

> "We do not agree with defendants construction of the statute. Rather, we agree with plaintiff that she was not a 'workman's compensation beneficiary entitled to benefits'

at the conclusion of the third party action, required for application of the statute.

"Under our worker's compensation statutes, where death results from a compensable injury a new cause of action for death benefits arises and vests in the legal beneficiaries of the decedent. 'This cause of action [for death benefits] is separate and distinct from the cause of action for compensation belonging to the injured employee during his life and which will, upon his death, vest in his legal beneficiaries the right to claim all compensation payments which had accrued at the time of his death but had not been paid." *American Motorists Insurance Co. v. Villa Gomez,* 398 S.W. 2d 742, 744 (Tex. 1966)

"They are so distinct that the employee can, by no act or deed, release or affect the cause of action [for death benefits] belonging to the legal beneficiaries." *Traders and General Insurance Co. v. Baldwin,* 125 Tex. 577, 84 S.W. 2d 439 (1935).

In our case, Plaintiff was not 'at the conclusion of [the] third party action a workman's compensation beneficiary [who was] entitled to compensation,' whithin the application of the statute. Mr. Walsh was the beneficiary at that time. It was only after Mr. Walsh's death that plaintiff became a beneficiary under the worker's compensation statutes.

Any other result would impose a lien upon a non-recipient of Workman's Compensation benefits for injuries received by the decedent which are noncompensable under the widow's claim."

In *Roberts v. All American Engineering Company,* 248 Atl. 2d 280, 104 N.J. Super. 1 (1968), the Appellate Division of the Superior Court of New Jersey upheld the rights of a widow and dependents to compensation benefits and denied the imposition of a lien asserted by virtue of a third party recovery received by

the employee when he was still alive. The reasoning of this court is highly appropriate in the instant case as follows:

> "Since the widow and children had no legal rights in the fund created by the employee's third party action, the employer has no right to be subrogated to any part of this fund by way of reimbursement therefrom for any dependency payments made to the widow and children... Therefore, under the circumstances here present, we conclude that N.J.S.A. 34:15-40(b) does not release the employer or its insurance carrier from liability to the petitioner and her children for the dependency payments awarded to them by the trial court.
>
> This result does not effectuate a 'double recovery' rather it equitably carries out the purpose of N.J.S.A. 34:15-40 by 'martialing the rights and responsibilities of the several parties concerned in compensation payments where, in the course of his employment, injury or death comes to a workman as a result of the fault of a third party*** *United States Casualty Co. v. Hercules Powder Co.*, supra, 4 N.J. at page 165, 72 A. 2d at page 195. Moreover, this result assures the availability of an unimpaired fund for the relief of the surviving dependents of the employee, an obvious salutary objective of the Workman's Compensation Act..."

The New Jersey court then went on to cite with approval the New York decision of *Kresci v. Mike Krasilousky Trucking Co.*, 5 A.D. 2d 569, 172 N.Y.S. 2d 322 (App. Div. 1958) wherein the New York Superior Court denied a carrier the right to a credit against a dependent's claim as follows:

> "The rights of employers and carriers as respects recoveries against third parties are created and defined by Section 29 of the Workman's Compensation Law. We find therein no support for appellant's position. That section treats causes of action for personal injuries and those for death damages as separate remedies, as clearly they are, even when the same wrong gives rise to both (Decedent Estate Law Sections 119,

120, 130). The subrogatory and other rights conferred by Section 29 are there treated as similar separate and independent, as respects the separate causes of action to which they apply. 'Disability compensation and death benefits are distinct from each other and are entirely unrelated. Disability compensation is paid to an injured employee. Death benefits are for a decedent's dependents. Likewise the two causes of action, the one for wrongful death and the other for personal injuries, are separate and distinct. The former is for the loss resulting to the person's pecuniarly damaged by his death; while the latter is for the tortious injury to the person or property of the deceased during his lifetime.' ****

The damages recovered by decedent were for his personal injuries, including such elements as pain and suffering which are not comprehended in payments by employers and carriers under the Workman's Compensation Law, and the settlement proceeds remaining after reimbursement of the compensation received were his to do with as he pleased. See *Hitt v. Cardillo,* 76 U.S. App.B.C. 334, 131 F. 2d 233, Certiorari denied 318 U.S. 770, 63 S. Ct. 760, 87 L. Ed. 1140. That some part of the proceeds reached the hands of his dependents, by gift and by inheritance, is of no moment. It may be worthy of remark that appellant's claim as a credit against the award only the unexpended proceeds and would thus penalize such dependents as these, who with decedent chose to conserve, rather than to dissipate the monies received.

Accord, *Schwabacher v. International Salt Co.,* 272 App. Div. 173, 70 N.Y.S. 2d 370 (App. Div. 1947) affirmed 298 N.Y. 726, 83 N.E. 2d 140 (Ct. App. 1948); see also *Laird v. State of Vermont Highway Dept.*, 112 Vt. 67, 20 A. 2d 555, 562 (Sup. Ct. 1941)."

In accord with the foregoing decision is the recent New Jersey case of *Brumfield v. Gallo Wine Sales of New Jersey, Inc.*, N.J. Super. A.D. 443 A. 2d 731 (1982). Here the Superior Court

quoted with approval the decision of the County Court wherein it was held that:

> "It is inconceivable that the legislature had ever intended under these circumstances, that such an obligation should be transferred from a respondent and visited and imposed upon dependent children to the extent of reducing and depriving them of their benefits, which they are entitled to have and receive by virtue of the statute. For unless the statute directly provides for a deduction from compensation already awarded, such mandate may not be inferred, and therefore, none may be ordered."

In considering all of the legal authorities on the subject it is clear that those jurisdictions which have specifically addressed the factual situation present in the instant case, have all found in favor of the receipt of death benefits under the Workman's Compensation Act, and the inequity,if there be such, is placed upon the employer under the obvious spirit and intent of the Workman's Compensation Act.

Given the intent of the Arizona Workmen's Compensation Act, it is clear that the independent statutory right, a *res* held by the Petitioner, was taken by the State of Arizona for public use, the secondary purpose of funding the public insurance carrier (the State Compensation Fund), without just compensation. The focus now shifts to whether this taking was unconstitutional.

For centuries legal scholars have believed that the state possesses the power to take or destroy property for the benefit of the social unit, but they also believe that when the state acts in that way, it is obligated to compensate the injured property owner for his losses. See *Grotius, De Jure Belliet Pacis Lib.* III C. 20 VII 1 (1625); *Blackstone, 1 Blackstone's Commentaries* 137 (Chitty Ed. 1829). The just compensation clause of the Fifth Amendment to the Constitution was built upon this concept of a moral obligation to pay for governmental interference with private property. In the first half of the Nineteenth Century state courts applied this theory

of moral obligation or natural law to protect private property interests from state appropriations. See, e.g. *Gardner v. Village of Newburgh,* 2 Johns. Chapter 162 (N.Y. 1816) State constitutions now almost universally require that landowners be compensated when their property is taken by the state for a public use. Unlike the federal government, the state governments are not, for purposes of the Federal Constitution, creatures of limited or enumerated powers. When examining a state exercise of eminent domain, therefore, it is not necessary to determine whether the exercise of the power is necessary and incidental to the exercise of an express power. This exercise of power will be valid so long as it does not violate any provision of the *Constitution* or its amendments.

In 1868 the Fourteenth Amendment was made part of the Federal Constitution; its due process clause specifically protecting property rights. The Fourteenth Amendment, however, does not expressly require either that state "takings" of private property be for a public use or that the property owner receive just compensation for the loss. In 1897, in *Chicago, Burlington, and Quincy Railroad Company v. City of Chicago,* infra, this Honorable Court, in an opinion by the elder Justice Harlan held that due process required both that the property be taken for a public use and that the owner of the property be compensated by the state for his loss. *Chicago, Burlington, and Quincy Railroad Company v. City of Chicago,* 166 U.S. 226 (1897). Today, the Supreme Court cites that decision as incorporating the compensation clause into the Fourteenth Amendment and applicable to state action. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 159 (1980).

Given that the taking clause applies to state action, the issue then becomes, as it does in many eminent domain cases, does the governmental interference amount to a "taking"? As applied to the case at bar, the issue is whether the State of Arizona's acts through the Industrial Commission of Arizona extending the lien against an employee's widow to death benefits, constitutes such a taking.

Although the concept of a taking may originally have contemplated only physical appropriation, it is plain today that non-acquisitive governmental action may amount to a taking in a constitutional sense. See e.g., *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393 (1922); *United States v. Causby,* 328 U.S. 256 (1946); *Lenoir v. Porter's Creek Water Shed District,* 586 F. 2d 1081, 1093 (6th Cir., 1978). Further, the state possesses the power to regulate property without payment of compensation; however, if the regulation goes too far, a taking may also be found. *Pumpelli v. Green Bay Company,* 80 U.S. (13 Wall.) 166, 179 through 180 (1871). The case at bar is a case of regulation of non-physical property.

In regulation cases, it has been held that,

> "When [regulation] reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation to sustain the act." *Pennsylvania Coal Company v. Mahon Company,* 260 U.S. 393, 413 (1922).

The court therein found that the extent of the regulation was so great as to constitute a taking. In the words of Justice Holmes:

> "to make it commercially impractical to mine certain coal has nearly the same effect for constitutional purposes as appropriating or destroying it." Id. at 414.

In the case at bar, the effect of attaching the husband's lien to the widow's death benefits has the effect of delaying any compensation guaranteed by the independent statutory right until Petitioner has come very near to approaching the end of her life expectancy. The effect of the regulation is to all but deny the death benefits due her in their entirety. Clearly this would be at least a serious interruption in the use of the property and the equivalent of a taking analogous to that found in *Pumpelli v. Green Bay Company,* 80 U.S. (13 Wall.) 166 (1871).

Professor Michelman, in his generally applauded and accepted note on the "taking" area, has described four factors, any one of which is normally determinative in evaluating whether compensation is constitutionally due. They are: 1. Whether or not the public, government or one of its agents have physically used or occupied something belonging to the claimant. 2. The size of the harm sustained by the claimant or the degree to which his affected property has been devalued. 3. Whether the claimant's loss is or is not outweighted by the public's concomitant gain. 4. Whether the claimant has sustanied any loss apart from the restriction of his liberty to conduct some activity considered harmful to other people. *Michelman, Property, Utility, and Fairess:* Commentaries on the Ethical Foundations of "Just Compensation" Law, 80 Harvard Law Review 1165, (1967).

In the case at bar, clearly the first threee determinative factors apply; 1. The Industrial Commission's decision has caused the State Fund, a governmental entity, to occupy and use the benefits which belong to the Petitioner. 2 and 3. The Petitioner has sustained the total loss of the benefits and has been forced to incur the total burden of her loss whereas the general public through the State Fund has not been forced to absorb the loss and suffers no great degree of harm. This is totally contrary to the risk-shifting concept of the Worker's Compensation Act. In a nutshell, the state is commanded by statute to buy the death benefit right from the dependent; while what happened here is that the death benefit right was taken by an unauthorized extension of the lien against a clearly separate independent statutory right, without just compensation.

On the assumption that the foregoing premise is reasonable, the final issue to be addressed is that of what is just compensation.

The *Fifth and Fourteenth Amendments, supra,* require that a person receive "just compensation" for property that has been taken by the state or federal government. The Supreme court has said that the constitutional guarantee of just compensation is not a limitation of the power of eminent domain, but only a condition

of its exercise. *Long Island Water Supply Company v. Brooklyn,* 166 U.S. 685, 689 (1897). The most basic principle for determining the amount due an individual whose property has been taken is contained in the often quoted statement by Justice Holmes that the test is "what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce v. City of Boston,* 217 U.S. 189, 195 (1910). Thus, determination of what the injured property owner has lost fixes the amount for which the state is liable. Here the courts normally look to the market value of the property that has been taken. However, in this case, such an analysis need not be reached for the market value of cash, is its face value.

Finally, in petitioning for this discretionary writ, the undersigned would be remiss in not directing the attention of this Honorable Court to the human tragedy involving the denial of death benefits to a widow who lost her husband due to an on-the-job injury.

Granted this case does not involve headline moral issues such as when life may begin, continue, or be terminated Nor does it challenge the power of any branch of government. What it does involve is a sixty year old widow, who is deprived of her husband, and then her widow's benefits. Is she a member of a class entitled to be protected by this Court? Yes.

Here the Petitioner has been denied a benefit to which she has been legally found entitled and yet she walks through life alone. She has depended on receiving these benefits and they have now been wrongfully taken. The courts of the State of Arizona have offered no remedy, content to protect the public insurance carrier despite the intent of the statutes and constitutional commands to the contrary. This Court is the last chance this widow has against the monolithic Industrial Commission of Arizona to set right this travesty of justice.

I therefore *implore* this Court to take jurisdiction of this case and restore the Petitioner's constitutional right to worker's compensation widow's benefits.

CONCLUSION

For the reasons outlined above, Petitioner respectfully requests that this most Honorable Court grant her Petition for Writ of Certiorari, or in the alternative, that the Opinion and Order of the Court of Appeals of the State of Arizona, Division One, be summarily reversed, or such other and further relief as to this Honorable Court may appear appropriate.

RESPECTFULLY SUBMITTED this 11 day of December, 1984.

RABINOVITZ, DIX & REHLING, P.C.

By _____

Bernard I Rabinovitz
P.O. Box 41658
Tucson, Arizona 85717
(602) 624-5526
Attorneys for Petitioner

APPENDIX A

FLORENCE E. MANNEL,
Petitioner,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

DEPARTMENT OF TRANSPORTATION,
Respondent Employer,

STATE COMPENSATION FUND,
Respondent Carrier.

I CA-IC 3021

DEPARTMENT B

O P I N I O N

Special Action—Industrial Commission
ICA CLAIM NO. 454-12-6153
CARRIER NO. 78-34366
Administrative Law Judge Jerry C. Schmidt
AWARD AFFIRMED

Rabinovitz, Dix & Rehling, P.C.
by Bernard I. Rabinovitz
Attorneys for Petitioner — Tucson

Sandra Day, Chief Counsel
The Industrial Commission of Arizona
Attorney for the Respondent — Phoenix

Robert K. Park, Chief Counsel
State Compensation Fund
by James F. Crane
Attorneys for Respondents Employer & Carrier — Tucson

GREER, Judge

This is a special action review of an Industrial Commission award granting death benefits, but subjecting them to the compensation insurer's credit from an A.R.S. § 23-1023 lien on specified proceeds from the employee's settlement of his claim with the third party tortfeasor. The issue presented is whether present death benefits that had not matured when the employee's third party claim against the tortfeasor was settled are subject to the credit. We hold that the benefits are subject to the credit, and therefore affirm the award.

The petitioner (wife or widow) is the only dependent of the deceased employeee. In September, 1978, the employee suffered a compensable industrial injury caused by negligent third parties. The employee successfully claimed worker's compensation benefits, and he and his wife sued the third parties.[1] The parties subsequently settled, released the third party tortfeasors from all present and future claims,[2] and received the settlement proceeds. The compensation carrier approved the settlement, received reimbursement of compensation already paid to the employee ($24,655.57), and reserved a credit against future liability

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[1]The complaint alleged that "the plaintiff has sustained severe and permanent injuries; has undergone and will continue to undergo medical treatment and expense, has suffered and will continue to suffer indefinitely in the future from pain, suffering, aggravation, inconvenience, and in addition, has suffered wage losses in the past and a loss of earning and earning capacity in the future." It sought "compensatory damages to reasonably and justly compensate plaintiffs for their losses," punitive damages, costs, and other relief.

[2]The release applies to "all claims, actions, causes of action, claims for relief, claims for loss of consortium, demands, rights, damages, costs, expenses or compensation whatsoever which [they] now have or may have on account or in any way growing out of the personal injuries sustained by [the employee] . . . ." It also acknowledges that the employee "may have sustained injuries that are presently unknown to him or anyone else and that there may be unforeseen consequences for both such known and unknown injuries and it is [their] express intention. . . that all such injuries and potential injuries and potential consequences thereof are covered by and included in this release."

($90,194,70),[3] which credit would diminish as the worker's benefits accrued.

After this settlement and approval, the employee's disability benefits countinued to accrue, and the compensation carrier applied them to reduce the credit. In April 1982, the employee died. The employee's right to future disability benefits ceased, but the widow's right to death benefits matured. A.R.S. § 23-1045(B), A.R.S. § 23-1046. The credit balance was then approximately $79,000.

The widow claimed death benefits. The compensation carrier denied the claim, and in the alternative subjected the death benefits to the outstanding credit. At the scheduled hearings, the widow established that the industrial injury caused the employee's death. She also testified that she did not know how much of the original settlement proceeds remained, but that what remained was hers by right of survivorship. The administrative law judge issued the award granting death benefits, but subjecting them to the credit. The award was affirmed on administrative review, and this special action followed.

A.R.S. § 23-1023 states, in relevant parts:

> A. If an employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.
>
> * * *

---

[3]There are two approval agreements. Concerning the compensation carrier's credit, the first states that the satisfaction of the carrier's lien "is not intended to and does not affect the rights or obligations of [the employee, his employer, and the compensation carrier] under the workmen's compensation laws of this state as to future benefits that may be due to [the employee]... or future credits that may be due [the compensation carrier and the employer]...." The second states that this credit "shall apply to all heretofore incurred but unpaid medical benefits and disability compensation, if any, and to all future medical benefits and disability compensation for which [the carrier] may become liable by virtue of a Notice of Claim Status issued by [the carrier], or an award of the Industrial Commission of Arizona."

> C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid.

These subsections concern the same subject; they therefore are interpreted as a whole. *Talley v. Industrial Commission,* 1 CA-IC 2809 (Ariz. App. Aug. 16, 1983). The general purposes of this statutory lien are to require the third party to pay what he would normally pay if there were no workers' compensation, to reimburse the carrier for its compensation expenditure, and to allow the compensation beneficiary to enjoy the excess of the damage recovery over compensation. 2A A. Larson, *Workmen's Compensation Law* § 74.16(a) (1983). This statutory lien is an exception to the general rule that an insurance company may not be an assignee or a subrogee of its insured's tort claim. *Talley v. Industrial Commission,* slip op. at 5-6. The statutory terms determine whether a lien is allowed. *Sunstate Equipment Corp. v. Industrial Commission,* 135 Ariz. 477, 662 P.2d 152 (App. 1983). If a lien is allowed, it applied to the entire third party recovery (less expenses and attorney's fees), even though this recovery includes damages not compensated under workers' compensation (such as pain and suffering, loss of pleasures in life, and a spouse's loss of consortium). *Liberty Mutual Insurance Co. v. Western Casualty & Surety Co.,* 111 Ariz. 259,527 P.2d 1091 (1974).

The hearing judge relied on *Triste v. Industrial Commission,* 25 Ariz. App. 489, 544 P.2d 706 (1976) as authority for the award. The widow contends that *Triste* is not controlling due to factual differences and new arguments that she raises which were not addressed in *Triste.*

In *Triste,* the carrier was entitled to have its death benefit obligation offset by a § 23-1023 lien on settlement proceeds. The deceased employee had had a compensable back injury, but while undergoing surgery for it suffered a cardiac arrest. He was comatose for over three years until he died. Before his death, his wife

sued for medical malpractice in the capacity of his guardian and next best friend of the minor children. With the compensation carrier's consent, she settled and executed a general release for all present and future claims. After the employee died, the wife and her minor children claimed workers' compensation death benefits. Benefits were granted, but offset by a lien on the settlement proceeds. On review, the claimants conceded that the lien properly applied to offset the widow's death benefits and would properly apply to offset the children's, provided the children were properly represented in the third party settlement; claimants argued the children were not properly represented. The court rejected the challenge to the representation and affirmed the award.

The widow argues that *Triste* is factually different. She contends the third party suit in that case must have involved a wrongful death claim because the children otherwise had no separate claim for relief. It is true that children do not have a separate claim, *Jeune v. Del E. Webb Construction Co.*, 77 Ariz. 226, 269 P.2d 723 (1954), *overruled on other grounds* 108 Ariz. 582, 503 P.2d 803 (1973) (recognizing spouse's claim for loss of consortium), however it does not follow that the children sued the third party for wrongful death. The children had potential wrongful death claims. A valid compromise of those claims subjected their subsequently matured death benefits to the lien credit: "[I]f the settlement was a valid compromise of the *potential* claims of the children, then the carrier would be entitled to set off the net amount of the settlement proceeds after deducting the expenditures for the deceased against its obligation for payment of death benefits." *Triste v. Industrial Commission*, 25 Ariz. App. 491, 544 P.2d 708 (emphasis added).

Triste therefore is not factually distinct. Here the widow also had a potential wrongful death claim which she compromised. The case at bar is even stronger, because unlike the children in *Triste*, here the widow had an *actual* claim for loss of consortium when the claim was settled.

The widow next argues that *Triste* did not address the statutory interpretation arguments that she now presents. We agree. *Triste resolved only the narrow question of whether the children's*

claims were effectively compromised. Although it did not address her agruments, it assumed a rule contrary to the widow's position. Triste interpreted § 23-1023(C) to give the compensation carrier "a lien in the amount actually collectible from the [third party tortfeasor] to the extent of the carrier's obligation for *compensation benefits." Triste v. Industrial Commission,* 25 Ariz. App. 491, 544 P.2d 708 (1976) (emphasis added). Compensation benefits include medical benefits, disability benefits, and death benefits. *See* A.R.S. § 23-901(4). Furthermore, this interpretation is consistent with the general purpose of the lien statute to reimburse the carrier for its compensation expenditure.

The widow argues that this interpretation conflicts with the terms of § 23-1023. She relies on the general principle that disability benefits are distinct from death benefits. We agree that benefits are an independent statutory right that do not derive from the decedent. A worker's compromise of his rights to workers' compensation medical expenses and disability benefits does not affect the rights of his dependent's death benefits. *See, e.g., Kay v. Hillside Mines, Inc.,* 54 Ariz. 36, 91 P.2d 867 (1939); accord 2 A. Larson, *supra,* § 64. We disagree, however, that this general principle supports the widow's statutory interpretation arguments.

The widow first argues that the lien applies to only the employee's third party recovery because subsection (A) allows only the injured employee to "pursue *his* remedy against such other person." A.R.S. § 23-1023(a) (emphasis added). This interpretation of "his" ignores the immediately preceding phrase referring to the employee's dependents if he should die.[5]

Additionally, the widow's interpretation is anomalous because the injured employee and his dependents may have simultaneous civil remedies: a survival action brought by the personal representative for the decedent's estate, *see In Re Estate of Milliman,* 101

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[5]Section 23-1023(B) makes the intended reference clear: "if the employee entitled to compensation under this chapter, or his dependents, does not pursue *his or their* remedy against such other person ...." A.R.S. § 23-1023(B) (emphasis added).

Ariz. 54, 415 P.2d 877 (1966); *Barragan v. Superior Court,* 12 Ariz. App. 402, 470 P.2d 722 (1970), and a wrongful death action brought in the name of the personal representative or the surviving spouse for the benefit of the statutory beneficiaries, *see* A.R.S. §§ 12-611, 12-612, 14-3110. Both may have simultaneous claims for workers' compensation: the deceased employee's estate for benefits that accrued while the deceased was alive, *see Reed v. Industrial commission,* 104 Ariz. 412, 454 P.2d 157 (1969), and the dependents for death benefits, *see* A.R.S. § 23-1046.

The widow next argues that if only the injured employee pursues his third party claim, the lien applies to offset his benefits only. First, this argument ignores the fact that the injured employee's third party recovery precludes the dependent's independent wrongful death recovery. *See e.g., Mellon v. Goodyear,* 277 U.S. 335, 48 S. Ct. 541, 72 L. Ed. 906 (1928).[6] Second, the employee's third party recovery is the only fund from which the compensation carrier can be reimbursed for its compensation payments. The widow's argument would be persuasive if the dependents had a viable wrongful death claim. In that case, the carrier would have a separate fund for reimbursement for death benefits. *Cf. Roberts v. All American Engineering Co.,* 104 N.J. Super. 1, 248 A.2d 280 (1968) (lien applied only to employee's benefits because widow was not a party to the third party settlement and had a viable wrongful death claim). However, in the present case the widow participated in the third party settlement, and compromised both her actual loss of consortium claims and her potential wrongful death claim. The effect of the settlement is to settle her claims.

The widow next argues that if only the injured employee is receiving compensation benefits when the Claim is settled, the lien applied to offset his benefits only because subsection (C) allows the lien "to the extent of *such* compensation and medical, surgical and hospital benefits paid." A.R.S. § 23-1023(C) (empha-

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[6]This rule has been criticized. *See, e.g., Sea-Land Services Inc. v. Gaudet,* 414 U.S. 573, 94 S. Ct. 806, 39 L. Ed.2d 9 (1974) (refusing to extend traditional rule to maritime law). *See generally* 25A C.J.S. Death § 47(b) (1966).

sis added). She interprets the word "such" to refer to the compensation benefits paid to the compensation beneficiary when the third party claim was settled. Although this is a possible interpretation, we disagree that it is the most natural one.

The predecessor to the current 23-1023 required the claimant to elect between his civil remedy and workers' compensation. *See, e.g.,* Laws 1925, Ch. 83. § 66. The current version eliminates this election and requires the carrier to pay "compensation and medical, surgical and hospital benefits...as provided in this chapter...." A.R.S. § 23-1023(C). The revision provides for the compensation carrier's reimbursement by giving it "a lien on the amount actually collectable from such other person [the third party] to the extent of such compensation and medical, surgical and hospital benefits paid." A.R.S. § 23-1023(C). Because the carrier is required to pay all compensation, including death benefits, even if the third party claim is pursued, death benefits should be included in the compensation benefits that the lien offsets.

The widow also argues that any ambiguity in § 23-1023 should be resolved in her favor to achieve the remedial purpose of the workers' compensation law. One purpose of § 23-1023, however, is to reimburse the compensation carrier for its expenditure.

The issue was raised at oral argument that death benefits should be excluded from § 23-1023 because they are not specifically included in the statute. In *Hornback v. Industrial Commission,* 106 Ariz. 216, 474 P.2d 807 (1970), the Arizona Supreme Court recognized that absent carrier approval of a third party settlement, a worker was not entitled to reopen his claim and thereby receive additional benefits, even though the original settlement was for $10,000, whereas the benefits awarded were only accident benefits and $266.06. The supreme court rejected the worker's argument that since the settlement exceeded the compensation benefits, carrier approval was unnecessary because the carrier had no interest in the settlement, not being liable for any deficiency in the settlement.

The supreme court was unable to accept the worker's argument because it ignores the fact that the employee in this action is seeking to reopen his claim and seek more compensation.

106 Ariz. at 220. The supreme court's reasoning implies that carrier approval of a third party claim is a prerequisite to reopening because the carrier is entitled to protect its subrogation rights to "all rights of the employee against a third party tortfeasor," *id.* at 219, including those rights which would reimburse reopening benefits. This is so even though § 23-1023 does not specifically mention reopening benefits. Since the supreme court recognizes a carrier's interest in protecting its lien to reimburse the carrier's liability for reopening benefits, we cannot say that the carrier lacks an interest in the settlement for reimbursement of death benefits.[7]

We recognize conflicting out-of-state authority on this question.[8] Some cases rely on dissimilar statutes. *E.g., Transcontinental Insurance Co. v. Walsh,* 621 S.W.2d 461 (Tex. App. 1981) (statute applied the lien to third party recovery by "a workman's compensation beneficiary...entitled to compensation...."). Others are less obviously distinguishable, *see, e.g., Cresci v. Mike Krasilousky Trucking Co.,* 172 N.Y.S.2d 322 (1958), and often rely on the distinction between disability and death benefits, *see generally* 2A A. Larson, *supra,* § 23-1023, however Arizona laws and not out-of-state authority, are determinative.

Finally, the widow argues that the application of a § 23-1023 lien to offset death benefits violates the Arizona constitutional provision on workers' compensation. *See* Ariz. Const. Art. 18, §

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[7]A. Larson (2A A. Larson, *Workmen's Compensation Law,* §§ 71.20, 74-16(a) (1983)) recognizes that the objectives of a good workmen's compensation statute are many and varied, and "with all these balls to be kept in the air at the same time, it is perhaps not surprising that a few statutes have perfectly performed this juggling act." § 74.16 at 14-355.

[8]Other cases are consistent. *E.g., Richardson v. U.S.F. & G., 102 So.2d 368 (Miss. 1958).*

8.[9] This paragraph prohibits a reduction in the percentages and amounts of compensation provided in the original worker's compensation act. *See Atkins v. Industrial Commission,* 95 Ariz. 239, 389 P2d 118 (1964). The widow's death benefits have not been reduced; she is credited with the full amount allowed by A.R.S. § 23-1046. The compensation carrier, however, is not required to make an actual payment of death benefits until the credit is exhausted.

For the foregoing reasons, the award is affirmed.

D.L. GREER, Judge

CONCURRING:

BRUCE E. MEYERSON
Presiding Judge, Department B

DONALD F. FROEB, Judge

[9]Article 18, section 8 states in relevant part:

The percentages and amount of compensation provided in House Bill No. 227 enacted by the Seventh Legislature of the State of Arizona, shall never be reduced nor any industry included within the provision of said House Bill No. 227 eliminated except by initiated or referred measure as provided by this Constitution.

APPENDIX B

RE: FLORENCE L. MANNEL vs.
INDUSTRIAL COMMISSION et al
Supreme Court No. 17621-PR
Court of Appeals No. 1 CA-IC 3021
Industrial Commission No. 454-12-6153

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 13, 1984, in regard to the above-referenced cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 14th day of September 1984.

S. ALAN COOK, Clerk

TO: Bernard I. Rabinovitz, Esq.
Sandra Day, Esq., Chief Counsel, Industrial Commission
Robert F. Park, Esq., Chief Counsel, State Compensation Fund
James F. Crane, Esq., State Compensation Fund, Tucson
Glen D. Clark, Clerk, Court of Appeals, Division One

APPENDIX C

FLORENCE E. MANNEL, *Petitioner,*	Supreme Court No. 17621-PR
vs.	Court of Appeals No. 1 CA-IC 3021
THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*	Industrial Commission No. 454-12-6153
DEPARTMENT OF TRANSPORTATION, *Respondent Employer,*	
STATE COMPENSATION FUND, *Respondent Carrier.*	

ORDER

IT IS ORDERED that Petitioner's "Motion for Permission to File Motion for Reconsideration" is denied.

DATED this 2nd day of October, 1984.

WILLIAM A. HOLOHAN
Chief Justice

TO: Bernard I. Rabinovitz, Esq., Rabinovitz, Dix & Rehling, 721 N. 4th Ave., Tucson, AZ 85705
James Crane, Esq., State Compensation Fund, 55 E. Helen St., Tucson, AZ 85705
Sandra Day, Chief Counsel, Industrial Commission of Arizona, P.O. Box 19070, Tucson, AZ 85005
Robert K. Park, Chief Counsel, State Compensation Fund, P.O. Box 6769, Phoenix, AZ 85005

APPENDIX D

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

THE ESTATE OF
HOWARD MANNEL, *Deceased,*
FLORENCE E. MANNEL, *Widow,*
Applicant,

vs.

DEPARTMENT OF
TRANSPORTATION
Defendant Employer,

STATE
COMPENSATION FUND,
Defendant Insurance Carrier

ICA Claim No. 454-12-6153
Carrier Claim No. 78-34366
Date of Injury: 9-21-78

DECISION UPON HEARING
AND FINDINGS AND AWARD
GRANTING
WINDOW'S CLAIM FOR
DEATH BENEFITS AND
FOR LIEN PURSUANT
TO A.R.S. §23-1023

Heretofore, on October 12, 1978, Howard Mannel, the deceased, filed a claim for workmen's compensation benefits for an industrial injury sustained while employed by the above-named defendant employer on September 21, 1978.

The defendant insurance carrier herein accepted Mr. Mannel's claim and on September 2, 1981 issued a NOTICE OF CLAIM STATUS asserting its lien against third party settlement. On May 14, 1982 Florence Mannel, the widow and applicant herein, filed a claim for death benefits for the death of her husband on April 16, 1982. On June 4, 1982 the defendant insurance carrier denied the applicant's claim.

Thereafter, on August 13, 1982 the applicant filed a REQUEST FOR HEARING and pursuant thereto, formal hearings were held in Tucson, Arizona on January 3, 28 and February 7, 1983. The applicant is represented by Mr. Bernard I. Rabinovitz and the defendant insurance carrier is represented by Mr. James F. Crane.

The undersigned, having fully considered the file, records and all matters hereunto appertaining, now enters FINDINGS AND AWARD as follows:

FINDINGS

1. On September 21, 1978 Howard Mannel sustained an industrial injury while employed by the above-named defendant employer who at said time was insured under the provisions of the Arizona Workmen's Compensation Act against liability for the payment of medical, surgical, hospital and/or compensation benefits. The applicant herein entered into an agreement to compromise and settle a third party claim which arose out of the subject industrial episode for the sum of $160,000.00. The State Compensation Fund approved the settlement and received the sum of $24,655.57 in complete payment of its claim lien to that point and asserted a credit against the payment of any further compensation, medical, surgical and hospital benefits.

2. On September 21, 1978 Howard Mannel was checking the temperature of a truck load of hot asphalt when the truck lurched forward causing him to fall into the material. Mr. Mannel quickly removed himself avoiding any burns and in the process sustained

a strain of the right shoulder and neck.
Within a short time of that episode Mr. Mannel began experiencing extreme shortness of breath which increased in intensity and resulted in his seeking medical attention. He was found to be in atrial fibrillation and underwent cardioversions. The applicant's symptoms persisted and it was ultimately determined that he had sustained a ruptured Chordea tendonea of the mitral valve causing mitral valve insufficiency. Mr. Mannel's physical condition progressively deteriorated resulting in several hospitalizations and installation of a pacemaker. Mr. Mannel's condition was essentially inoperable and he was totally disabled. In the last month or so before his death his wife observed a change in his complexion and testified that he spent most of his time sleeping and that he was having more difficulty than he had previously with shortness of breath. On April 16, 1982 Mr. Mannel died a sudden death in a barber's chair while having a haircut. At the time of his death there was a credit still in existence in the sum of approximately $79,000.00.

3. Board certified cardiologist, John Carroll, M.D., testified that he first saw the deceased in 1973 in consultation and did not see him again until 1979 when he appeared with complaints of sudden shortness of breath and irregularity of heartbeat. Dr. Carroll testified regarding his findings upon examining the applicant as well as his treatment thereafter for mitral valve insufficiency. Dr. Carroll testified during the year prior to Mr. Mannel's death he observed a progressive deterioration of his physical condition. It was Dr. Carroll's opinion that Mr. Mannel died of sudden cardiac arrhythmia ventricular fibrillation. Dr. Carroll testified further that it was his opinion within a reasonable degree of medical probability that Mr. Mannel's sudden death was the result of the industrial injury, treatment and medication.

4. Board certified cardiologist, Richard McCarty, M.D., testified regarding his findings upon examining Mr. Mannel in June 1979. It was Dr. McCarty's opinion that Mr. Mannel had sustained a ruptured mitral valve Chordea Tendonae as a result of the industrial accident of September 21, 1978. In response to a lengthy hypothetical setting forth the history of Mr. Mannel's physical deterioration and death following Dr. McCarty's exami-

nation, Dr. McCarty responded that there was no doubt in his mind that the sudden death was causally related to the mitral valve insufficiency which was contributed to by the subject industrial episode of September 1978.

5. Board certified cardiologist, Brendan Phibbs, M.D. testified to his findings upon examining the applicant in June 1981. In response to questions concerning the cause of Mr. Mannel's sudden death Dr. Phibbs stated that he was unable to respond because no autopsy had been performed and that there were a number of "things" or "diseases" which could cause sudden death.

6. An applicant seeking to recover death benefits has the burden of proof by a preponderance of the evidence to establish all of the material elements of her claim, *Russell v. Industrial Commission,* 104 Ariz. 548, 456 P.2d 918 (1969). The term preponderance was defined by the Court of Appeals in *Brooks v. Industrial Commission,* 24 Ariz. App. 395, 539 P. 2d 199 (1975) as follows:

> "Preponderance of the evidence means such evidence as when weighed with that opposed to it has more convincing force, and from which it results that a greater probability is in favor of the party upon whom the burden rests. It does not necessarily depend upon the number of witnesses; it merely means that the testimony which points to one conclusion appears to the trier of facts to be more credible than the testimony which points to the opposite one. The capacity of the submitted testimony to enforce belief on the arbiter to whom it is submitted is the touchstone of preponderance as applied to the testimony of witnesses." (Citations omitted)

7. Under the Workmen's Compensation Act two independent and separate rights of recovery exist, the one of the workman during his lifetime and the other of his dependents after his death, *Kay v. Hillside Mines, Inc.,* 54 Ariz. 36, 91 Pac. (2d) 867 (1939). In the instant case the applicant must establish a causal relationship between the industrial injury and the decedent's ultimate demise. *Brown v. Industrial Commission,* 20 Ariz. App. 486, 513 P.2d 1369 (1973). Moreover, such facts pertaining to medical causation must be established to a reasonable medical probability or

certainty, *Micucci v. Industrial Commission,* 108 Ariz. 194, 494 P.2d 1324 (1972). The Industrial Commission cannot find such a relationship based upon mere possibilities, *Gronowski v. Industrial Commission,* 81 Ariz. 363, 306 P.2d 285 (1957) or where the medical evidence is fraught with uncertainty, *Cross v. Industrial Commission, 81 Ariz. 222, 303 P.2d 710 (1956). Where there exists a conflict in the expert medical evidence it is the responsibility of the Administrative Law Judge to resolve it, Walters v. Industrial Commission,* ____ Ariz. ____ (Ct. App.) ____ P.2d ____ (1 CA-IC 2720, 12/21/82).

8. In the instant case although Dr. Phibbs could not offer an opinion regarding the cause of the death of Mr. Mannel, there nevertheless exists a conflict between the experts, *State Compensation Fund v. Industrial Commission,* 24 Ariz. App. 31, 535 P.2d 623 (1975). This conflict is resolved by adopting the opinions of Drs. Carroll and McCarty as being more probably correct. The preponderance of the evidence establishes that the demise of Howard Mannel was within a reasonable degree of medical probability caused by the subject industrial episode and resultant injury.

9. A.R.S. §23-1023 sets forth the liability of third persons to injured employees and provides:

> "A. If an employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.
>
> "...
>
> "C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery.

> The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. Compromise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the compensation fund, or of the person liable to pay the claim."

Under the statutory provision an injured employee may sue a third party and collect workmen's compensation benefits, however, the employer or the employer's carrier has a lien on the amount the employee receives from the third party to the extent of the benefits the employer is required by law to provide, *Chevron Chemical Co. v. Superior Court,* 131 Ariz. 431, 641 P.2d 1275 (1982). Such third party settlement agreements are subject to the written approval of the defendant insurance carrier, *Liberty Mutual Insurance Company v. Western Casualty and Surety Company,* 111 Ariz. 259, 529 P.2d 1091 (1974). The doctrine of equitable subrogation is founded on principles of equity and its purpose is a prevention of injustice and it is adopted by equity to compel ultimate payment of a debt by one who in justice and good conscience ought to pay it. *Kilpatrick v. Superior Court,* 105 Ariz. 413, 466 P.2d 18 (1970). The purpose of the subrogation provision is to compensate the employer and the insurance carrier to some extent for the additional liability they assume under the Workmen's Compensation Act for wrongful acts of independent third party tort-feasors, *Fisher v. Missoula White Pine Sash Company,* 518 P.2d 795 (Montana, 1974).

10. The question presented is whether the defendant insurance carrier given the circumstances of the settlement with the third party is entitled to set off the settlement proceeds against the death benefits due to the applicant/widow. On July 13, 1981 the decedent and his surviving spouse entered into an "Agreement to Compromise and Settle Claims and Release of all Claims" which provided in part:

> "...(D)o hereby for themselves, their heirs, executors, administrators, successors and assigns, release, acquit,

exonerate and forever discharge...(the third party)...of and from any and all claims, actions, causes of action, claims for relief, claims for loss of consortium, demands, rights, damages, costs, expenses or compensation whatsoever which the undersigned now have or may have on account of or in any way growing out of the personal injuries sustained by Howard M. Mannel on or about September 21, 1978..."

The agreement set forth the knowledge of the decedent and his surviving spouse that the injuries were permanent, progressive and disabling in nature and that he may have sustained injuries which were presently unknown at the time of entering into the agreement and that there "may be unforseen consequences for both such known and unknown injuries". The agreement proceeded to release the third party for all "such injuries and potential and potential consequences".

11. There appears to be only one Arizona case similar in nature to the issue presented and it admittedly has nominal distinctions. In *Triste v. Industrial Commission,* 25 Ariz. App. 489, 544 P.2d 706 (1976) the Court was called upon to determine whether the Commission correctly decided that the carrier, given the circumstances of a settlement with a third party was entitled to set off the settlement proceeds against the death benefits due for children of a deceased. The Court in allowing the set off observed:

"The parties here do not dispute that if the settlement was a valid compromise of the potential claims of the children, then the carrier would be entitled to set off the net amount of the settlement proceeds after deducting the expenditures for the deceased against its obligations for payment of death benefits..."

And

"Even if we assume that there was some technical deficiency in Mrs. Triste's representaton of her children in the settlement, we cannot conclude in the circumstances of this case that the carrier must be denied the setoff which the Commission awarded it. There is no suggestion that petitioner, or anyone else with an interest in this matter, wishes to undo the settlement which was made, and upon which proceeds have already been paid. This settlement was approved by the carrier on the petitioner's representation that it was a valid settlement of the family's rights. Under

ordinary principles of estoppel, a party to a settlement is not entitled to keep the benefits of it while renouncing the burdens...."

12. While apparently other jurisdictions have interpreted similar statutes differently it is felt that in the instant case, *Triste, supra,* is controlling. The defendant insurance carrier is entitled to set off the settlement proceeds against the death benefits due to the surviving spouse.

13. The defendant insurance carrier is liable for such expenses of burial of the deceased not to exceed the sum provided for in A.R.S. §23-1046 as it was in effect at the time of the subject industrial episode.

14. The applicant is entitled to such compensation benefits as provided for in A.R.S. §23-1046 A(2) as was in effect at the time of the subject industrial episode.

15. That by virtue of the settlement of the decedent's third party action, no benefits are payable until a new credit of $79,000.00 is exhausted.

A W A R D

THE APPLICANT IS HEREBY AWARDED:

1. Expenses of burial of the deceased from the defendant insurance carrier not to exceed the sum provided for in A.R.S. §23-1046 as it was in effect at the time of the subject industrial episode.

2. Such compensation benefits as provided for in A.R.S. §23-1046 A(2) as was in effect at the time of the subject industrial episode.

3. That by virtue of the settlement of the decedent's third party action, no benefits are payable until a new credit of Seventy-Nine Thousand and No/100 Dollars ($79,000.00) is exhausted.

NOTICE: Any party dissatisfied with this Award may file a written request for review of the same with the Administrative Law Judge Division of The Industrial Commission within THIRTY (30) DAYS after the mailing of this Award as provided for by Arizona Revised Statutes, §23-942 D and §23-943 A and B (1973). Unless such written request is made within the time provided, this Award is final.

By_____
JERRY C. SCHMIDT
Administrative Law Judge

JCS:bes
DATED AND MAILED IN TUCSON, ARIZONA THIS 16TH DAY OF FEBRUARY 1983.

APPENDIX E

§23-1021. Right of employee to compensation

A. Every employee coming within the provisions of this chapter who is injured, and the dependents of every such employee who is killed by accident arising out of and in the course of his employment, wherever the injury occurred, unless the injury was purposely self-inflicted, shall be entitled to receive and shall be paid such compensation for loss sustained on account of the injury or death, such medical, nurse and hospital services and medicines, and such amount of funeral expenses in event of death, as are provided by this chapter.

B. Every employee covered by insurance in the state compensation fund who is injured by accident arising out of and in the course of employment, and the dependents of every such employee who is killed, provided the injury was not purposely self-inflicted, shall be paid such compensation from the state compensation fund for loss sustained on account of the injury, shall receive such medical, nurse and hospital services and medicines, and such amount of funeral expenses in event of death, as provided in this chapter.

§23-1023. Liability of third person to injured employee; election of remedies

A. If any employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.

B. If the employee entitled to compensation under this chapter, or his dependents, does not pursue his or their remedy against such other person by instituting an action within one year after the cause of action accrues, the claim against such other person shall be deemed assigned to the insurance carrier, or to the person liable for the payment thereof. Such a claim so assigned may be prosecuted or compromised by the insurance carrier or the person liable for the payment thereof, or may be reassigned in its entirety

to the employee or his dependents. After the reassignment, the employee entitled to compensation, or his dependents, shall have the same rights to pursue the claim as if it had been filed within the first year.

C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery. The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. Compromise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the compensation fund, or of the person liable to pay the claim.

§23-1046. Death benefits

A. In case of an injury causing death, the compensation therefor shall be known as a death benefit, and shall be payable in the amount, for the period, and to and for the benefit of the persons following:

1. Burial expenses, not to exceed one thousand dollars, in addition to the compensation.

2. To the surviving spouse, if there is no child, thirty-five per cent of the average wage of the deceased, to be paid until such spouse's death or remarriage, with two years' compensation in one sum upon remarriage.

3. To the widow or widower, if there is a child or children, the additional amount of fifteen per cent of such wage for each child

until the age of eighteen years, the total not to exceed sixty-six and two-thirds per cent of the average wage.

4. To a single surviving child, in the case of the subsequent death of a surviving husband or wife, or if there is no surviving husband or wife, twenty-five per cent of such average wages, or if there is more than one surviving child, twenty-five per cent for one child and fifteen per cent for each additional child, to be divided among such children share and share alike, but not exceeding a total of sixty-six and two-thirds per cent of the average wage. Compensation to any such child shall cease upon death, marriage or upon reaching the age of eighteen years, except, if over eighteen years and incapable of self-support, when it becomes capable of self-support.

5. To a parent, if there is no surviving husband, wife or child under the age of eighteen years, if wholly dependent for support upon the deceased employee at the time of his death, twenty-five per cent of the average monthly wage of the deceased during dependency, with an added allowance of fifteen per cent if two dependent parents survive, and, if neither parent is wholly dependent, but one or both partly dependent, fifteen per cent divided between them share and share alike.

6. To brothers or sisters under the age of eighteen years, if there is no surviving husband or wife, dependent children under the age of eighteen years or dependent parent, the following shall govern:

(a) If one of the brothers or sisters is wholly dependent upon the deceased employee for support at the time of injury causing death, twenty-five per cent of the average monthly wage until the age of eighteen years.

(b) If more than one brother or sister is wholly dependent, thirty-five per cent of the average monthly wage at the time of injury causing death, divided among such dependents share and share alike.

(c) If none of the brothers or sisters is wholly dependent, but one or more partly dependent, fifteen per cent divided among such dependents share and share alike.

B. If the deceased employee leaves dependents only partially dependent upon his earnings for support at the time of injury, the monthly compensation shall be equal to such proportion of the monthly payments for the benefit of persons totally dependent as the amount contributed by the employee to such partial dependents bears to the average wage of the deceased at the time of the injury resulting in his death. The duration of compensation to partial dependents shall be fixed by the commission in accordance with the facts shown, and in accordance with the provisions of § 23-1047, but shall in no case exceed compensation for one hundred months.

C. A death benefit paid to an alien not residing in the United States shall be only sixty per cent of the amount specified in this section.

D. In event of death of a dependent before expiration of the time named in the award, the funeral expenses of such person, not to exceed eight hundred dollars, shall be paid.

APPENDIX F

Art. 18 § 8

Section 8. The Legislature shall enact a Workmen's Compensation Law applicable to workmen engaged in manual or mechanical labor in all public employment whether of the State, or any political subdivision or municipality thereof as may be defined by law and in such private employments as the Legislature may prescribe by which compensation shall be required to be paid to any such workman, in case of his injury and to his dependents, as defined by law, in case of his death, by his employer, if in the course of such employment peronal injury to or death of any such workman from any accident arising out of and in the course of, such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its agents or employee or employees to exercise due care, or to comply with any law affecting such employment; provided that it shall be optional with any employee engaged in any such private employment to settle for such compensation, or to retain the right to sue said employer or any person employed by said employer, acting in the scope of his employment, as provided by this Constitution; and, provided further, in order to assure and make certain a just and humane compensation law in the State of Arizona, for the relief and protection of such workmen, their widows, children or dependents, as defined by law, from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the State of Arizona, and producing uncertain and unequal compensation therefor, such employee, engaged in such private employment, may exercise the option to settle for compensation by failing to reject the provisions of such Workmen's Compensation Law prior to the injury, except that if the injury is the result of an act done by the employer or a person employed by the employer knowingly and purposely with the direct object of injuring another, and the act indicates a wilful disregard of the life, limb or bodily safety of employees, then such

employee may, after the injury, exercise the option to accept compensation or to retain the right to sue the person who injured him.

The percentage and amounts of compensation provided in House Bill No. 227[1] enacted by the Seventh Legislature of the Sate of Arizona, shall never be reduced nor any industry included within the provision of said House Bill No. 227 eliminated expect by initiated or referred measure as provided by this Consitution.